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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 205

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and

distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *.

SEC. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interest commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy

at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any

one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 202. * * *

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

* * * * * * *

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service,

or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * * * * *

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * * * *

SEC. 306. Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition

which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

* * * * * * *

SEC. 313 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission

in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

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Jurisdiction

The Order of the California Supreme Court denying a writ of review was entered on January 21, 1952 (R. 38). An Order denying petition for rehearing was entered on February 18, 1952 (R. 46). By order of Justice Douglas, dated May 1, 1952, time for filing a petition for writ of certiorari was extended to July 17, 1952 (R. 47). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), on the ground that the decision denied a title, right privilege or immunity specifically set up and claimed by the County of Mineral under the Federal Power Act, 41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U. S. C. 791 *et seq.*

The cases relied upon to sustain the jurisdiction of this Court are *Napa Valley Electric Co.* v. *Railroad Commission of the State of California*, 251 U. S. 366, 371-373; *Madera Sugar Pine Company* v. *Industrial Accident Commission of the State of California*, 262 U. S. 499, 500; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380; *Calderola* v. *Eckert*, 332 U. S. 155, 158; *United States* v. *Allegheny County*, 322 U. S. 174, 183-184; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366-367.

The California Commission ruled that it held exclusive jurisdiction. The County raised the same issue in Petition for review and Petition for rehearing. The California Supreme Court sustained the California Commission.[2] The questions presented are substantial as is more fully developed under the reasons for granting the writ (*infra*, pp. 6-8).

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[2] The denial by the California Supreme Court of the County's petition for a writ of review, without written opinion, "was necessarily a final judicial determination" as recognized by this Court in *Napa Valley Electric Co.* v. *Railroad Commission of the State of California*, 251 U. S. 366 at 373, and "the absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented . . .".

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Statement

At the argument before this Court in this cause on January 14, 1953, counsel for the California Commission pointed out that its brief as well as the briefs of the California Electric Power Company and of the United States failed to present legislative history material respecting

Questions Presented

The over-all question is whether the California Public Utilities Commission has jurisdiction, to the exclusion of the Federal Power Commission, over the sales of electric energy in California by the California Electric Power Company to the County of Mineral, delivery of which is taken by the County in California and by it transmitted on its own lines to its substation at Hawthorne, Nevada, for resale to Mineral County inhabitants.

Specifically the questions are:

1. Whether the interstate sale to the County is a "sale of electric energy to any person for resale" subject to Federal, rather than state regulations, under Sections 201(d) and 205 of Part II of the Federal Power Act.

2. Whether the Nevada Public Service Commission is a "properly constituted" authority to enter into a rate agreement with the California Public Utilities Commission within the meaning of Section 20 of Part I of the Act so as to preclude Federal Power Commission Jurisdiction.

Statutory Provisions Involved

Sections 3(3), 3(4), 20, and 201, of the Federal Power Act are involved as well as Section 2 of Nevada Statutes 1925 and Nev. Comp. L. (1929) Secs. 6106 and 6149. Pertinent provisions of these acts are set forth in the appendix, *infra*, pp. 10-15.

Statement

Mineral County's case here is a companion case to that of the United States of America vs. the same respondents. These causes have been heard and briefed together before the Federal Power Commission as well as before the California Commission. The Federal Power Commission held that it had exclusive jurisdiction over these sales, and its order asserting this jurisdiction is presently pending for

Section 20, Part I of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U. S. C. 791a, *et seq.*). It was stated that the reason for the deficiency in the California Commission's brief arose from inability after the efforts of some four months to obtain, either directly or through inter-library arrangements, the pertinent legislative documents. It was further stated that counsel had been given access to such documents in the library of this Court four days before the argument.* Mr. Chief Justice Vinson inquired whether it was desired to supplement the California Commission's brief with a presentation of references to such material. Counsel replied it would be grateful for that opportunity. Permission was granted. The following references and material are respectfully submitted.

History of Pertinent Language in Section 20, Federal Power Act

The language in Section 20 as it exists today is:

> ". . . and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State . . . . or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, . . . jurisdiction is hereby conferred upon the [Federal Power] Commission . . . ."

This identical language was first enacted in 1920 in the Federal Water Power Act of 1920, 41 Stat. 1063, Section 20. However, such identical language was first used three years earlier in a House bill substituting for S. 1419, 65th Cong., 2d Sess. (1917), which in turn had its genesis in an amend-

* The staff of the Supreme Court's Library was not only courteous but solicitous about procuring the material requested.

ment to S. 3331, 64th Cong., 1st Sess. (1916) proposed by La Follette on February 17, 1916. There is set forth herewith in chronological sequence the development of the language from 1916 to 1920.

S. 3331, 64th Cong., 1st Sess. (1916) contained the following language:

> "Section 7 . . . *Provided*, That where said power or any part of it shall enter into interstate or foreign commerce, the rates, charges, and service made and rendered, shall be reasonable, nondiscriminatory, and adequate to the public; and jurisdiction is hereby conferred upon and vested in the Interstate Commerce Commission to enforce this provision, upon the complaint of any person aggrieved, in the manner and according to the procedure and practice of that commission in fixing and regulating the rates and charges of railway companies . . ."

The language in this form was the subject of Sen. Rep. 89, 64th Cong., 1st Sess. (1916).

It will be noted that the language in S. 3331 vested jurisdiction over the rates of licensees exclusively in a federal commission whenever the power entered into interstate commerce. La Follette, however, on February 17, 1916, proposed an amendment, substituting for the language above quoted the following:

> "And in the event that any State shall not have provided a commission or other authority for the regulation and control of such charges, rates, and services, such regulation within such State shall be made and enforced by the Interstate Commerce Commission . . ."

This language was modified and reported to the Senate on March 3, 1916, to read as follows:

> ". . . and whenever the States directly concerned are unable to agree, through the properly constituted

authorities thereof, on either rates, charges, or services jurisdiction is hereby conferred upon and vested in the Interstate Commerce Commission to enforce this provision concerning the power that enters into interstate commerce . . . ."

S. 3331 was reported to the House which reverted to the earlier language giving exclusive jurisdiction in the Interstate Commerce Commission. The House referred the bill to its Committee on Interstate and Foreign Commerce in this form. The bill was subsequently modified again by striking Section 7 altogether and providing for jurisdiction over interstate sales by licensees to vest in the Secretary of War or "such body as may be provided by Federal statute." The bill in such form was the subject of H. R. Rep. No. 404, 64th Cong., 1st Sess. (March 21, 1916).

Nothing came of S. 3331 except that it became the model for S. 1419, 65th Cong., 2d Sess. (1917), introduced by Senator Shields on April 9, 1917, the same language being used in Section 7 as that previously adopted by the Senate in S. 3331. In such form S. 1419 was sent to the House on December 14, 1917. At the instigation of President Wilson a special Water Power Committee was formed in the House at that time. The Committee reported a substitute bill and in place of Section 7, substituted a Section 20 with language identical for the first time with that subsequently enacted in the Federal Water Power Act of 1920 (41 Stat. 1063) (now contained in the present Section 20 of Part I of the Federal Power Act). Extensive hearings were conducted on the substitute bill. *Hearings before House Committee on Water Power on S. 1419*, 65th Cong., 2d Sess., March 18-May 27, 1918. Since the testimony at such hearings related to the specific language contained today in Section 20, it is the most useful guide, aside from the language itself, to its meaning.

Before referring to particular parts of the testimony at such hearings, it should be noted that upon the strength of such testimony, the House issued H. R. Rep. No. 715, 65th Cong., 2d Sess. on June 28, 1918, and that subsequently a Conference Report, on S. 1419, 65th Cong., 3d Sess. was issued, which appears in the Congressional Record, 65th Cong., 3d Sess. 4630 *et seq.* Section 20 remained unchanged. The references to the reports, in the 66th Congress during which Section 20 was finally adopted are as follows: H. R. Rep. No. 61, 66th Cong., 1st Sess. (June 24, 1919) respecting H. R. 3184; Sen. Rep. No. 180, 66th Cong., 1st Sess. (September 12, 1919) respecting H. R. 3184; Sen. Rep. No. 269 and H. R. Rep. No. 910, 66th Cong., 2d Sess. (April 30, 1920) both of which constitute a conference report on H. R. 3184.

An examination of all the documents referred to indicates that none of the Congressional reports listed sheds any light on the meaning of Section 20 but that the testimony of hearings before the House Water Power Committee in 1919 as noted above, when the identical pertinent language of Section 20 was first being considered, proves most helpful. The page references in the following are to pages in the testimony in *Hearings before House Committee on Water Power on S. 1419*, 65th Cong., 2d Sess. March 18-May 27, 1918:

> Page 64, "Mr. Candler [speaking of Section 20]: Under your bill you leave it in the hands of the local authorities unless a dispute arises, and when a dispute does arise this [federal] commission acts as an arbitrator between them?
>
> "[Page 65] Mr. Merrill [spokesman for the draftsmen] Yes; on the theory that these are matters of local concern. . . .

It is assumed that if the States have provided themselves with full authority to act that there the Federal Commission shall not interfere.

"Mr. Lever. Shall not interfere even though they do not act?

"Mr. Merrill, *Even though they do not act,* provided they have power to act, and have established a commission or other similar authority for such purpose." (Italics added.)

Page 97. "Mr. Doremus. Is it your best judgment, and the judgment of those who prepared this bill, that the regulation of rates and charges and service as to interstate business should be left with the local authorities, the various State commissions?

"Mr. Merrill. *If they do it; and they are doing it now. . . . I know that the Nevada commission, for instance, is fixing the rates in Nevada for power which is delivered from plants operating in California;* I do not know whether the question has even come before the courts as to whether such business is or is not interstate commerce, within the meaning of the commerce clause of the Constitution, so that exclusive jurisdiction would be vested in the Federal Government, if it wished to exercise it. (Italics added.)

"Mr. Doremus. It might be a power which Congress could exercise, or, if it failed to exercise it, could be left in the jurisdiction of the State.

"Mr. Merrill. It is my judgment that so long as it is satisfactorily handled by the several States it had better be left with them."

Before concluding, it may perhaps not be amiss to state in writing what was said by counsel for the California Commission at the argument, viz., that an examination of the statutes of all of the forty-eight states reveals that at the time Section 20 was first enacted, and prior thereto, no state commission was vested with authority to enter

into compacts or affirmative agreements of any kind with the commission of any other state.

Respectfully submitted,

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Dated, Washington, D. C.
January 15, 1953.